

Benjamin D. Rodriguez

NAME

F 72457

PRISON NUMBER

FILED

R. J. Donovan Correctional Facility

CURRENT ADDRESS OR PLACE OF CONFINEMENT

San Diego, CA 92179

CITY, STATE, ZIP CODE

2007 NOV 21 PM 3:27

CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RM	2254	1983	DEPUTY
FILING FEE PAID			
Yes	No	<input checked="" type="checkbox"/>	
WTF MOTION FILED			
Yes	No	<input checked="" type="checkbox"/>	
COPIES SENT TO			
Court	ProSe	<input checked="" type="checkbox"/>	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Benjamin D. Rodriguez

(FULL NAME OF PETITIONER)

PETITIONER

v.
Warden Hernandez

(NAME OF WARDEN, SUPERINTENDENT, JAILOR, OR AUTHORIZED PERSON HAVING CUSTODY OF PETITIONER [E.G., DIRECTOR OF THE CALIFORNIA DEPARTMENT OF CORRECTIONS])

RESPONDENT

and

The Attorney General of the State of California, Additional Respondent.

Civil No.

'07CV 2230 J

LSP

(TO BE FILLED IN BY CLERK OF U.S. DISTRICT COURT)

PETITION FOR WRIT OF HABEAS CORPUS

UNDER 28 U.S.C. § 2254
BY A PERSON IN STATE CUSTODY

1. Name and location of the court that entered the judgment of conviction under attack: Superior Court of Calif., County of San Diego
2. Date of judgment of conviction: On May 3rd 2007
3. Trial court case number of the judgment of conviction being challenged: _____
4. Length of sentence: 20 years

5. Sentence start date and projected release date: May 3, 07 to 2023

6. Offense(s) for which you were convicted or pleaded guilty (all counts): PC. 288,

7. What was your plea? (CHECK ONE)

- (a) Not guilty
- (b) Guilty
- (c) Nolo contendere

8. If you pleaded not guilty, what kind of trial did you have? (CHECK ONE)

- (a) Jury
- (b) Judge only N/A

9. Did you testify at the trial?

- Yes
- No

DIRECT APPEAL

10. Did you appeal from the judgment of conviction in the California Court of Appeal?

- Yes
- No

11. If you appealed in the California Court of Appeal, answer the following:

- (a) Result: N/A
- (b) Date of result, case number and citation, if known: This particular instance
- (c) Grounds raised on direct appeal: Abuse of 1385 Discretion, and illegal Sentencing arbitration, 8th Amendment right violations, 6th and 14th Amendment right violations, points and Authorities. People v. Garcia (1999) 4th DIS. CAT.

12. If you sought further direct review of the decision on appeal by the California Supreme Court (e.g., a Petition for Review), please answer the following:

- (a) Result: N/A
- (b) Date of result, case number and citation, if known: Unknown
- (c) Grounds raised: N/A

13. If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to that petition:

(a) Result: Not yet

(b) Date of result, case number and citation, if known: N/A

(c) Grounds raised: In discovery

COLLATERAL REVIEW IN STATE COURT

14. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the California Superior Court?

Yes No

15. If your answer to #14 was "Yes," give the following information:

(a) California Superior Court Case Number: N/A

(b) Nature of proceeding: N/A

(c) Grounds raised: N/A Not applicable in this present instance being a laymen at law and having no access to the appropriate legal materials.

(d) Did you receive an evidentiary hearing on your petition, application or motion?
 Yes No

(e) Result: It would of been impassable. under the circumstance

(f) Date of result: N/A

16. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the California Court of Appeal?

Yes No

17. If your answer to #16 was "Yes," give the following information:

(a) California Court of Appeal Case Number: N/A

(b) Nature of proceeding: N/A

(c) Grounds raised: N/A

(d) Did you receive an evidentiary hearing on your petition, application or motion?
 Yes No

(e) Result: N/A

(f) Date of result: N/A

18. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the California Supreme Court?

Yes No

19. If your answer to #18 was "Yes," give the following information:

(a) California Supreme Court Case Number: N/A

(b) Nature of proceeding: N/A

(c) Grounds raised: N/A this is being addressed under other authorities.

(d) Did you receive an evidentiary hearing on your petition, application or motion?
 Yes No

(e) Result: N/A

(f) Date of result: N/A

20. If you did *not* file a petition, application or motion (e.g., a Petition for Review or a Petition for Writ of Habeas Corpus) with the California Supreme Court, containing the grounds raised in this federal Petition, explain briefly why you did not:

Laymen at Law, no access to the appropriate legal material, no understanding of the nature of these petitions, and or motions or writs of habeas corpus.

COLLATERAL REVIEW IN FEDERAL COURT

21. Is this your **first** federal petition for writ of habeas corpus challenging this conviction?

Yes No (IF "YES" SKIP TO #22)

(a) If no, in what federal court was the prior action filed? Not applicable
 (i) What was the prior case number? Not applicable
 (ii) Was the prior action (CHECK ONE):
 Denied on the merits?
 Dismissed for procedural reasons?
 (iii) Date of decision: Not applicable
 (b) Were any of the issues in this current petition also raised in the prior federal petition?
 Yes No
 (c) If the prior case was denied on the merits, has the Ninth Circuit Court of Appeals given you permission to file this second or successive petition?
 Yes No

CAUTION:

- **Exhaustion of State Court Remedies:** In order to proceed in federal court you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. This means that even if you have exhausted some grounds by raising them before the California Supreme Court, you must first present *all* other grounds to the California Supreme Court before raising them in your federal Petition.
- **Single Petition:** If you fail to set forth all grounds in this Petition challenging a specific judgment, you may be barred from presenting additional grounds challenging the same judgment at a later date.
- **Factual Specificity:** You must state facts, not conclusions, in support of your grounds. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do. A rule of thumb to follow is — state who did exactly what to violate your federal constitutional rights at what time or place.

GROUND FOR RELIEF

22. State *concisely* every ground on which you claim that you are being held in violation of the constitution, law or treaties of the United States. Summarize *briefly* the facts supporting each ground. If necessary, you may attach pages stating additional grounds and/or facts supporting each ground.

(a) **GROUND ONE:** California penal Code: 1385 Discretion Case Law. people V. Garcia (1999)

Supporting FACTS (state *briefly* without citing cases or law) I was convicted and sentenced to 20 years with 9 strikes, this is indeed a 14th amendment right violation. An 8th amendment right violation as well as a 6th Amendment right violation; This is a flagrant abuses of 1385 Discretion, The 9th circuit affirmed and the supreme court upheld and severely cautioned the 4th and 2nd district as to these discretion abuses, figuratively this an unfair and Illegal Sentence Struter. The trial Court Shoned its excercising of 1385 Discretion in a ~~at~~ arbitrary, Capricious or potently absurd Manner that resulted in a Illegal sentencing struter.
Also there was no emphasis placed on the fact this was a first offense there by blatantly disregarding the 9th circuit appeal to the second district and the 4th district, revealing the inevitability of reversal or meritorious grounds for reversal, the caution was placed on the 4th district to reveal a Absurd pattern of 1385 discretion abuses.

Did you raise GROUND ONE in the California Supreme Court?
 Yes No.

(b) **GROUND TWO:** 8th Amendment right violation:

Supporting FACTS (state briefly without citing cases or law): As a first offense the sentencing Judge overreached his judicial power's no where in the history of California Sentencing Law is there a case where a defendant bring a first timer has entered into arbitration as to "9" Strikes actually Sticking or being a permanent part of a plea agreement: SE: Wilding V. State of Calif. (1996) 4th Dis. people V. Trower (6 Dis.) Mo. people V. Brown 2003 CA1 Lexis 6516 CCal. Aug. 27 This also is a form of coercion in that this sentence "Currently" and any other conviction would be mandated: It is a due process Error, this sentence must be set aside and reconsidered! It cannot stand and will not stand. This is reversible Error and it is substantial. And the law does mandate such relief as is equivalent to the damages accrued. In this particular instance the defendant has suffered irreparable under such illegal sentencing arbitration, in all actuality a misdemeanor offense was committed against the defendant if not only for the sole purpose of future convictions this sentence must be vacated, and relief ordered. Respectfully.

Did you raise GROUND TWO in the California Supreme Court? Yes No.

Supporting FACTS (state briefly without citing cases or law): Clearly the sentencing stricken indicates reversible error. The damage accrued is accumulative, and if not addressed incurable: My constitutionally protected & inalienable guaranteed 14th amendment right was violated when the sentencing Judge did not fulfill the statute's criteria to the fullest extent of the LAW! Obviously I was not protected under my 14th amendment right's. This is nothing short of a due process violation, Again the sentence must be set aside and reconsidered. Respectfully.

Defendant would also pray the courts take into consideration the defendant has already accrued damage personally suffering under said arbitration, The damage accrued falls under multiple jurisdictions, it also falls under civil procedure. The defendant however Shall be satisfied with the finding of reversible error, and sent back to the trial Judge for a setting aside of this illegal arbitration and resentence, with substantial relief. Anything else under those circumstance would be unacceptable: The 4th District continues to blatantly disregard the 9th circuit Court of Appeals reprimands and cautions.

Did you raise GROUND THREE in the California Supreme Court?

Yes No.

(d) **GROUND FOUR:** 6th Amendment right violation.

Supporting FACTS (state briefly without citing cases or law): Obviously Court room administration was breached, fundamentally there is no court room administration if this inalienable right is obstructed, This is the Apex of "Due process" the above mentioned right violations Are ("inseparable") if all entities in the count of LAW are not working conductively for this protected right there is and was no justice. The sentence there-fore must be reversed. This is also strongly upheld in the commission on judicial performance, These flagrant right violation actually teeter on judicial misconduct, no ONE given attorney could be oblivious to such blatant disregard to constitutionally protected right. The Suprem court itself has severely Cautioned against such systematic Erosion of federally protected right's. We adressed the procedural prerequisites for the declaration of against penal intrest Exception.

Did you raise **GROUND FOUR** in the California Supreme Court?

Yes No.

23. Do you have any petition or appeal now pending in any court, either state or federal, pertaining to the judgment under attack?

Yes No

24. If your answer to #23 is "Yes," give the following information:

(a) Name of Court: N/A

(b) Case Number: N/A

(c) Date action filed: N/A

(d) Nature of proceeding: N/A

(e) Grounds raised: N/A

(f) Did you receive an evidentiary hearing on your petition, application or motion?

Yes No

25. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: IN PRO-Per

(b) At arraignment and plea: _____

(c) At trial: _____

(d) At sentencing: _____

(e) On appeal: N/A

(f) In any post-conviction proceeding: _____

(g) On appeal from any adverse ruling in a post-conviction proceeding: N/A

26. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes No

27. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes No

(a) If so, give name and location of court that imposed sentence to be served in the future:

N/A

(b) Give date and length of the future sentence: N/A

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes No N/A

28. Date you are mailing (or handing to a correctional officer) this Petition to this court: _____

November 14. 2007

Wherefore, Petitioner prays that the Court grant Petitioner relief to which he may be entitled in this proceeding.

Benjamin D. Rodriguez

SIGNATURE OF ATTORNEY (IF ANY)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

Nov. 15. 2007

^{BR.}
(DATE)

Benjamin D. Rodriguez

SIGNATURE OF PETITIONER

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE SECOND PAGE OF THIS FORM.)

I (a) PLAINTIFFS

Benjamin D. Rodriguez

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF San Diego
(EXCEPT IN U.S. PLAINTIFF CASES)

2254	1983
DEFENDANT	
FILING FEE PAID	
Yes	No <input checked="" type="checkbox"/>
HPP MOTION FILED	
Yes	No <input checked="" type="checkbox"/>
COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT	
NOT IN U.S. PLAINTIFF CASES ONLY	
COPIES SENT TO	
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND	
Count <input checked="" type="checkbox"/>	11 ProSe <input checked="" type="checkbox"/>

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER): Benjamin D. Rodriguez ATTORNEY(S) IF KNOWN

Hernandez CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

2007 NOV 21 PM 3:27

R.M.

DEPUTY

'07CV 2230 J LSP

II. BASIS OF JURISDICTION (PLACE AN X IN ONE BOX ONLY)

<input type="checkbox"/> U.S. Government Plaintiff	<input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)
<input type="checkbox"/> 2 U.S. Government Defendant	<input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

Citizen of This State	<input type="checkbox"/> PT <input type="checkbox"/> DEF	<input type="checkbox"/> PT <input type="checkbox"/> DEF
Citizen of Another State	<input type="checkbox"/> 1 <input type="checkbox"/> 1	Incorporated or Principal Place of Business in This State <input type="checkbox"/> 4 <input type="checkbox"/> 4
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 2 <input type="checkbox"/> 2	Incorporated and Principal Place of Business in Another State <input type="checkbox"/> 5 <input type="checkbox"/> 5
	<input type="checkbox"/> 3 <input type="checkbox"/> 3	Foreign Nation <input type="checkbox"/> 6 <input type="checkbox"/> 6

IV. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY).

28 U.S.C. 2254

V. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance	<input type="checkbox"/> PERSONAL INJURY	<input type="checkbox"/> PERSONAL INJURY	<input type="checkbox"/> 610 Agriculture	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 400 State Reappointment
<input type="checkbox"/> Marine	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 362 Personal Injury-Medical Malpractice	<input type="checkbox"/> 620 Other Food & Drug	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> Miller Act	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 365 Personal Injury-Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881	<input type="checkbox"/> PROPERTY RIGHTS	<input type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> Negotiable Instrument	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 630 Liquor Laws	<input type="checkbox"/> 820 Copyrights	<input type="checkbox"/> 450 Commerce/ICC Rates/etc.
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 330 Federal Employers' Liability	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 640 RR & Truck	<input type="checkbox"/> 830 Patent	<input type="checkbox"/> 460 Deportation
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 371 Truth in Lending	<input type="checkbox"/> 650 Airline Regs	<input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 380 Other Personal Property Damage	<input type="checkbox"/> 660 Occupational Safety/Health	<input type="checkbox"/> SOCIAL SECURITY	<input type="checkbox"/> 810 Selective Service
<input type="checkbox"/> 153 Recovery of Overpayment of Veterans Benefits	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 690 Other	<input type="checkbox"/> 861 HIA (13958)	<input type="checkbox"/> 850 Securities/Commodities Exchange
<input type="checkbox"/> 160 Stockholders Suits	<input type="checkbox"/> 355 Motor Vehicle Product Liability	<input type="checkbox"/> LABOR	<input type="checkbox"/> 710 Fair Labor Standards Act	<input type="checkbox"/> 862 Black Lung (923)	<input type="checkbox"/> 875 Customer Challenge 12 USC
<input type="checkbox"/> Other Contract	<input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 720 Labor/Mgmt. Relations	<input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act	<input type="checkbox"/> 863 DIWC/DIWW (405(g))	<input type="checkbox"/> 891 Agricultural Acts
<input type="checkbox"/> 195 Contract Product Liability	<input type="checkbox"/> REAL PROPERTY	<input type="checkbox"/> CIVIL RIGHTS	<input type="checkbox"/> 740 Railway Labor Act	<input type="checkbox"/> 864 SSID Title XVI	<input type="checkbox"/> 892 Economic Stabilization Act
	<input type="checkbox"/> 210 Land Condemnation	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 790 Other Labor Litigation	<input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 893 Environmental Matters
	<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 442 Employment	<input type="checkbox"/> 791 Empl. Ret. Inc.	<input type="checkbox"/> FEDERAL TAX SUITS	<input type="checkbox"/> 894 Energy Allocation Act
	<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 443 Housing/Accommodations	<input type="checkbox"/> Security Act	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)	<input type="checkbox"/> 895 Freedom of Information Act
	<input type="checkbox"/> 240 Tort to Land	<input type="checkbox"/> 444 Welfare		<input type="checkbox"/> 871 IRS - Third Party 26 USC 7609	<input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice
	<input type="checkbox"/> 245 Tort Product Liability	<input type="checkbox"/> 440 Other Civil Rights			<input type="checkbox"/> 950 Constitutionality of State
	<input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus			<input type="checkbox"/> 890 Other Statutory Actions
		<input checked="" type="checkbox"/> 530 General			
		<input type="checkbox"/> 535 Death Penalty			
		<input type="checkbox"/> 540 Mandamus & Other			
		<input type="checkbox"/> 550 Civil Rights			

VI. ORIGIN (PLACE AN X IN ONE BOX ONLY)

1 Original Proceeding 2 Removal from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from another district (specify) 6 Multidistrict Litigation 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER f.r.c.p. 23

DEMAND \$

Check YES only if demanded in complaint:

JURY DEMAND: YES NO

VIII. RELATED CASE(S) IF ANY (See Instructions): JUDGE

Docket Number

DATE November 21, 2007

SIGNATURE OF ATTORNEY OF RECORD

R.M.